(25)

APR 26 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 934

THE EMPORIUM CAPWELL COMPANY
(a corporation),
Petitioner,

vs.

CLIFFORD C. ANGLIM,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
AND SUPPORTING BRIEF.

M. C. SLOSS,
E. D. TURNER, JR.,
One Eleven Sutter, San Francisco, California,
Attorneys for Petitioner.

SLOSS & TURNER,
One Eleven Sutter, San Francisco, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Cases

Statutes

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No.

THE EMPORIUM CAPWELL COMPANY
(a corporation),
Petitioner,

vs.

CLIFFORD C. ANGLIM,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, The Emporium Capwell Company, a California corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment entered in the above-entitled cause on January 24, 1944, affirming a judgment of the United States District Court for the

Northern District of California, Southern Division, entered on January 15, 1943.

The action was brought by your petitioner in the District Court to recover the sum of $16,514.12 paid by your petitioner to Clifford C. Anglim as Collector of Internal Revenue at San Francisco, California, together with interest. The sum in controversy had been assessed by the Commissioner of Internal Revenue as a tax against the plaintiff for an alleged documentary stamp tax on the transfer in the course of, and as a part of, a statutory merger, of 412,853 shares of the common stock of your petitioner to the former shareholders of The Emporium Capwell Corporation, a Delaware corporation, which had, prior to the merger, owned and held said common shares of your petitioner.

Your petitioner contends, as it contended in both courts below, that the so-called transfer was exempt from taxation by reason of either or both of two regulations in force at the time of the transaction in question, i.e., Regulation 71, Article 35(r), as a transfer "wholly by operation of law", and Regulation 71, Article 35(e), as a "transfer of stock of a merged corporation in exchange for stock of a merging corporation at the time, and as part, of a statutory merger".*

*In the Appendix we include by quotation or summary the relevant portions of the statutes of California and of Delaware providing for the merger of corporations, and of the applicable provisions of the Internal Revenue Code and of the Treasury Regulations involved.

OPINIONS BELOW.

The opinion of the District Court is reported at 48 Fed. Supp. 292. It also appears at R. 77.

The opinion of the Circuit Court of Appeals is reported at 140 Fed. (2d) 224. It also appears at R. 103.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered on January 24, 1944 (R. 112). A petition for rehearing was seasonably filed on February 17, 1944, and was denied on March 1, 1944 (R. 113; 137 Fed. (2d) 224). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, §347).

STATEMENT.

The facts, as found by the trial court (R. 84), are undisputed. Every material allegation of the complaint (R. 2) was either admitted by the answer (R. 69) or was agreed upon by the written "Stipulation as to Certain Facts" (R. 70).

Prior to, and at the time of the merger here involved, plaintiff taxpayer, The Emporium Capwell Company (hereinafter called "California corporation") was a corporation organized under the laws of California.

The Emporium Capwell Corporation (hereinafter called "Delaware corporation") was a corporation organized under the laws of Delaware.

In 1939 the California corporation had outstanding, in addition to issues of 7% preferred and 4½% preference stock, 412,853 shares of common stock without par value. All of this common stock of California corporation was owned and held by Delaware corporation, which had issued and outstanding, in the hands of the public, 412,853 shares of its own capital stock without par value. The California corporation (taxpayer and petitioner) and the Delaware corporation, under date of September 20, 1939, made and entered into an agreement of merger and took the other steps provided in the laws of the respective states of incorporation (Civil Code of California, §361; Revised Code of Delaware 1935, Chapter 65, §§2091, 2092) to accomplish a merger of the two corporations, to become effective on the 31st day of January, 1940. The laws of both states provided that in order to effect a merger an agreement of merger must be approved by a majority of the Board of Directors of each corporation and by at least two-thirds of all of the stockholders of each. Under each statute the merger becomes effective when the agreement, accompanied by proper acknowledgments and certificates, is filed with the Secretary of State of each of the states.

The agreement of merger (R. 8) provided that the two corporations "shall merge and be merged into a single corporation" (R. 11); "that said single corporation shall be The Emporium Capwell Company" (the California corporation) (R. 11); that the merger "shall operate to extinguish all the issued capital stock of The Emporium Capwell Corporation" (the Delaware corporation); that "the 412,853 shares of such stock held by holders other

than The Emporium Capwell Corporation shall, by such merger, be extinguished, and such merger shall effect the transfer, from The Emporium Capwell Corporation to the holders of the said 412,853 shares of its capital stock proportionately, of all the issued and outstanding common stock of The Emporium Capwell Company, being 412,853 shares without par value, all presently held by The Emporium Capwell Corporation" (R. 12). The agreement goes on to provide (R. 13-14) that the mode of carrying the terms and provisions of the merger into effect and the manner and basis of converting the shares, etc. of The Emporium Capwell Company shall be as follows:

> "(a) After the merger herein provided for shall have become effective, the outstanding shares of the capital stock of The Emporium Capwell Corporation will, by the terms of such merger hereinabove set forth, have been extinguished, and each of the holders of record of such shares (other than The Emporium Capwell Corporation itself) will, by the terms of such merger, have become the owner of a like number of shares of the common stock of The Emporium Capwell Company, transferred to such holder from The Emporium Capwell Corporation."

On June 10, 1941 the Commissioner of Internal Revenue assessed a tax of $16,514.12 against your petitioner (California corporation) and the respondent, as Collector, made demand upon the California corporation for the payment of said sum as a documentary stamp tax under the Internal Revenue Code on the transfer of said 412,853 shares of the common stock of the California corporation to the former shareholders of said Delaware corporation as a part of the statutory merger (R. 6). In accordance

with said demand, and to avoid further penalties for non-payment, your petitioner, on June 14, 1941, paid said sum of $16,514.12 to the respondent Collector (R. 6-7). On July 2, 1941 your petitioner duly filed with the Commissioner of Internal Revenue a claim for refund of said sum of $16,514.12; on the 12th day of November, 1941, said Commissioner rejected said claim and mailed to petitioner a notice of the disallowance of said claim (R. 7). The present action was brought to recover said sum claimed to have been illegally assessed and collected.

The District Court entered judgment that the plaintiff take nothing and that the defendant have judgment for costs (R. 89).

On appeal by the plaintiff, the Circuit Court of Appeals entered judgment affirming the judgment of the District Court (R. 112).

QUESTIONS PRESENTED.

Where a Delaware corporation and a California corporation entered into a merger agreement under the statutes of both states providing for such merger, and the merger agreement, effective January 31, 1940, provided that the Delaware corporation should, upon the merger, cease to exist, and that the California corporation (taxpayer) should survive, and further provided that the merger should operate to extinguish all the capital stock of the Delaware corporation (which owned all the common stock of the California corporation), and that, by the merger, the prior owners of the capital stock of the

Delaware corporation would become the owners of a like number of shares of the common stock of the California corporation:

1. Were the transfers of shares of common stock of the California corporation to former holders of the extinguished capital stock of the Delaware corporation transfers which resulted "wholly by operation of law" and therefore exempt from transfer tax under Regulation 71, Article 35, subdivision (r)?

2. Were the transfers of shares of the common stock of the California corporation to former holders of the extinguished capital stock of the Delaware corporation "transfers of the stock of the merged corporation in exchange for stock of the merging corporation at the time, and as a part, of a statutory merger", and therefore exempt from transfer tax under Regulation 71, Article 35, subdivision (e), in effect at the time of the merger?

REASONS FOR ALLOWANCE OF WRIT.

1. In holding that the transfer was not exempt under Reg. 71, Art. 35(r) as a transfer "wholly by operation of law", the lower court rendered a decision in conflict with its own earlier decisions[1] and in conflict with a later decision of this Court.[2]

---

[1] *U. S. v. Merchants Nat. Trust & Savings Bank*, 101 Fed. (2d) 399;
U. S. v. Seattle First Nat. Bank, 136 Fed. (2d) 676.

[2] *U. S. v. Seattle First Nat. Bank*, decided March 27, 1944, 88 U. S. Supr. Ct., Law. Ed. Adv. Op. 593 (not yet officially reported).

Before the lower court decided this case, there had been a divergence between the decisions in the Ninth Circuit[3] and decisions in other Circuit Courts of Appeals.[4] Courts of Appeals in other Circuits had interpreted the words "wholly by operation of law" in subdivision (r) as excluding from the exemption any transfer accomplished by a statutory merger or consolidation in which the voluntary action of the two or more corporations involved, or of their directors and stockholders, had played any part. The court below had taken a contrary view in the two cases decided by it. In the instant case, the court below followed the views of the other Circuit Courts of Appeals, departing from its earlier decisions in the *Merchants National etc. Bank* and *Seattle First National Bank* cases, and undertook to distinguish these cases on grounds which, it is respectfully submitted, are untenable.

Even more important is the fact that, after the decision of this case in the lower court, this Court, which had granted certiorari in the *Seattle First National Bank* case, decided that case on March 27, 1944,[5] and, in so doing, interpreted subdivision (r) in a manner contrary to the decisions in Circuits other than the Ninth, in accord with the earlier decisions of the Ninth Circuit, and contrary to the decision in the instant case, in which the lower court had departed from its earlier holdings.

---

[3]See cases cited in note 1 supra.

[4]*Koppers Coal & Transportation Co. v. U. S.*, 107 Fed. (2d) 706;
Weil v. U. S., 115 Fed. (2d) 999;
Niagara Hudson Power Co. v. Hoey, 117 Fed. (2d) 414;
City Bank Farmers Trust Co. v. Hoey, 125 Fed. (2d) 577;
State Street Trust Co. v. Hassett, 134 Fed. (2d) 156.

[5]Cited in note 2, supra.

The writ should be granted:

(a) Because of confusion in various decisions of the different Circuit Courts of Appeals and conflict between decisions in the Circuit Court of Appeals for the Ninth Circuit and decisions of other Circuit Courts of Appeals.

(b) Because of conflict between different decisions of the Circuit Court of Appeals for the Ninth Circuit.

(c) Because the lower court has, in this case, decided a question of federal law in a way in conflict with an applicable decision of this Court.

2. In holding that the transfer was not exempt, under Reg. 71, Art. 35, (e), as a transfer of stock in exchange for other stock at the time and as part of a statutory merger, the lower court has decided an important question of federal law which has not been, but should be, settled by this Court.

Since the regulations have the force of law, it is important to both taxpayers and the government that the meaning and effect of such regulations be correctly and authoritatively determined.

For reasons which will appear fully in the brief accompanying this petition, we submit that the lower court gave Reg. 71, Art. 35, (e) an interpretation directly contrary to its true meaning and effect.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and

determination, a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its docket as No. 10,423, The Emporium Capwell Company, a corporation, Appellant v. Clifford C. Anglim, Appellee, to the end that said cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals entered January 24, 1944 be reversed by this Court, and that petitioner be granted such other and further relief as to this Court may seem proper.

Dated, San Francisco, California,
April 19, 1944.

M. C. SLOSS,
E. D. TURNER, JR.,
Attorneys for Petitioner.

SLOSS & TURNER,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No.

THE EMPORIUM CAPWELL COMPANY
(a corporation),
Petitioner,

vs.

CLIFFORD C. ANGLIM,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE TRANSFER WAS EXEMPT FROM TAX UNDER TREASURY REGULATONS 71, ARTICLE 35(r).

The question is whether the transfer sought to be taxed occurred "wholly by operation of law" within the meaning of Article 35(r), and was therefore exempt from tax.

The Circuit Court of Appeals answered this question in the negative.[1] The decision of this Court in the *Seattle First National Bank* case answers it in the affirmative.

The opinion of Mr. Justice Murphy (to which there was no dissent) in the *Seattle* case, after pointing out the validity of the exemptions declared in the regulations, says:

> "It is clear that the consolidation or merger of the national bank and the state bank occurred through the voluntary acts of the respective directors and stockholders pursuant to the provisions of Section 3 of the National Banking Act, with the approval of the Comptroller of the Currency. If the words 'wholly by operation of law,' as used in the administrative regulations, refer here to the entire process of consolidation, of which the transfer of securities is an essential part, the exemption cannot be applied. But in a broad sense, few if any transfers ever take place 'wholly by operation of law' for every transfer must necessarily be a part of a chain of human events, rarely if ever other than voluntary in character. Thus to give any real substance to the exemption, we must take a more narrow view and examine the transfer apart from its general background. We must look only to the immediate mechanism by which the transfer is made effective. If that mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties, then the transfer may truly be said to be 'wholly by operation of law.'

---

[1]Its opinion declares (R. 111): "Here, there was co-operation and participation of the stockholders, board of directors and the two corporations. The assets in this case could only be transferred to the stockholders in Delaware by the act of the parties."

> Here the actual transfer to respondent of the legal and beneficial title to the securities owned by the state bank was not effected by or dependent on any of the voluntary acts relating to the consolidation agreement or the ratification or approval thereof. * * * Rather the transfer occurred solely and automatically by virtue of Section 3 of the National Banking Act."

By the same process of reasoning, the transfer in the case at bar occurred "solely and automatically" by virtue of the statutory provisions of California and Delaware authorizing the merger. Under these statutes, the procedure resulting in the merger was initiated by the agreement of the two corporations, just as, under Section 3 of the National Banking Act,[2] the first step toward the consolidation considered in the *Seattle First National Bank* case consisted of the making of an agreement of consolidation by the directors of the two banks involved. Under either the National Banking Act or the merger statutes of California and Delaware, the terms and conditions of the merger are set forth in the agreement. To ascertain what those conditions are one must look to the agreement, but, as held in the *Seattle First National Bank* case, those terms and conditions become effective and operative by reason of the statute which permits the merger or consolidation.

Thus, applying the language of this Court in the Seattle case, it is the merger statute (or statutes) "that is the mechanism by which the transfer of securities is made effective. No voluntary act of the parties is neces-

[2] 12 U.S.C., sec. 34a.

sary." Under Section 361(5) of the Civil Code of California, the agreement becomes effective only when, with the necessary certificates, it is filed with the Secretary of State, and thereupon "the several parties thereto shall be one corporation". Under the Delaware Corporation Law (Sec. 59), the agreement, certified and acknowledged, shall be filed in the office of the Secretary of State "and shall thence be taken and deemed to be the agreement and act of consolidation or merger of said corporations".

The transfer here involved was a transfer of common stock of the California corporation, theretofore owned by the Delaware corporation, to the stockholders of the latter, which expired through the merger and whose own shares were extinguished thereby. The transfer was specifically provided for by the agreement of merger, which declared (R. 12) that "such merger shall effect the transfer, from The Emporium Capwell Corporation to the holders of the said 412,853 shares of its capital stock proportionately, of all the issued and outstanding common stock of The Emporium Capwell Company, being 412,853 shares without par value, all presently held by The Emporium Capwell Corporation".

This provision for the transfer of the stock of the California corporation, theretofore held by the Delaware corporation, was properly included in the agreement of merger (and hence in the legal effect of the merger itself) by both the California and the Delaware statutes. Section 361(1) of the Civil Code of California provides that the agreement between the two corporations shall set forth "the terms and conditions of merger or con-

solidation, and the mode of carrying the same into effect, *as well as the manner and basis of converting the shares of the constituent corporations into the shares of the consolidated or surviving corporation*". (Emphasis supplied.) The same provision, in almost identical words, is contained in the Delaware statute (Sec. 59).

It is submitted therefore, that the transfer did not, and could not, become effective except through the merger, which itself was made effective and operative by virtue of the statutes of the two states. It was the statutes alone which gave operative effect to all the provisions of the agreement, including the provision that "such merger shall effect the transfer".[3]

II.

THE TRANSFER WAS ALSO EXEMPT FROM TAX UNDER TREASURY REGULATIONS 71, ARTICLE 35(e).

At the time of the merger, Regulations 71, Article 35(e), read as follows:

---

[3]No legal significance attaches to the fact included in the "Stipulation as to Certain Facts" (R. 71-72) that the certificate for shares of the common stock of the California corporation owned by the Delaware corporation was endorsed by the latter and delivered to the Transfer Agent of the former. The same Stipulation includes the letter of the California corporation accompanying the delivery (R. 75) and showing that the certificate was delivered after the merger had become effective, that the California corporation maintained that the stock had already been transferred "pursuant to the agreement of merger", and that the certificate was delivered for purposes "of record on the books of this company". The surrender of the endorsed certificate did not transfer title, since, as the California corporation correctly stated, the transfer had already taken place by virtue of the merger. (*Mastin v. Mastin*, 99 Fed. 435.)

"Article 35. Sales or transfers not subject to tax. The following are examples of transactions not subject to the tax:

(e) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as part of a statutory merger, and the substitution of new certificates for the certificates representing the old stock of the merging corporation."

To interpret and apply the Regulation, it is necessary to first answer this question:

Which of the two corporations, parties to a merger, is referred to by the Regulation as the "merged" corporation and which as the "merging"?

We contend that the surviving corporation (California) is the one designated as "merged", and the dying or absorbed corporation (Delaware) is the one designated as "merging".

Obviously, if this view be correct, the transfer here sought to be taxed falls directly within the terms of subdivision (e). It was a transfer of stock of the California corporation at the time and as part of a statutory merger. It was a transfer in exchange for stock of the Delaware corporation, as shown by paragraphs (4a) and (5a) of the merger agreement (R. 12-13; 13-15), defining the terms and conditions of the merger and the manner and basis of converting the shares. It also, clearly, involved the substitution of new certificates (of the California corporation) for the certificates representing the old stock of the merging (Delaware) corporation.

In rejecting the petitioner's claim of exemption under Article 35(e), the Circuit Court of Appeals based its reasoning (R. 105-106) upon the assumption that the Regulation designates the surviving (California) corporation as the "merging" corporation and the defunct (Delaware) corporation as the "merged" corporation. It is respectfully urged that this interpretation directly transposes the true meaning of the words "merging" and "merged", as used in the Regulation.

We submit, briefly, the reasons which we believe should lead to the conclusion that subdivision (e) must be read as meaning, by "merged" corporation, the continuing one, and by "merging", the dying one:

(a) The contrary interpretation—the one adopted by the Circuit Court of Appeals—would make the Regulation meaningless and ineffective for, if "merged" corporation means the one that goes out of existence, and "merging" the one that survives, it is difficult or impossible to imagine a situation to which the exemption declared by subdivision (e) could apply. The last clause of the subdivision contemplates the issuance of new certificates and the substitution of them for certificates representing the old stock of the "merging" corporation. If new certificates are substituted for old, clearly the new certificates are those of the surviving corporation, and certificates representing "old stock" are certificates of stock of the absorbed or dying corporation. The term "new certificates" must refer to certificates of stock which is to have a continuing existence and validity. It cannot apply to certificates of stock in a corporation

which expires in the merger and whose stock ceases to exist after the merger. Likewise, if certificates are substituted for certificates representing "old stock", the substitution contemplated can only be of something having continuing validity for something which has ceased to have value or life. The "new" is clearly a stock which is to endure, the "old" a stock which is wiped out.

(b) Our position is fortified by a consideration of subdivision (d) of Regulations 71, Article 35, in effect at the time of this merger (see Appendix). That subdivision dealt with consolidations. As applied to corporations, consolidation and merger are closely parallel. In each, two or more corporations unite.

Subdivision (d) included in transfers exempt from tax "the surrender of the stock of the consolidating corporation in exchange for stock of the consolidated corporation". Comparing this subdivision with (e), we have two provisions which apply to similar situations, and should therefore be given like construction in so far as they contain the same word or words of the same grammatical form. It is not to be supposed that the Treasury Department, in framing these Regulations, distinguished between the continuing corporation and the extinguished corporation by designating the former as "consolidated" and the latter as "consolidating" in subdivision (d), and used the parallel terms "merged" and "merging" in the opposite sense in subdivision (e). It is submitted that whichever of the corporations is meant by "consolidating" in (d) is the one meant by "merging" in (e), and that the one designated as "consolidated" in

(d) is the one designated as "merged" in (e). It can hardly be doubted that under (d) the corporation which is to have a continuing future existence is the "consolidated" corporation. Not only is this the meaning apparent on the face of the words used, but it is, for reasons indicated above with respect to subdivision (e), the only one which would give the exemption any purpose or effect.

(c) Amendments of the Regulations adopted in 1942 throw light on the meaning of the former subdivision (e) and indicate clearly that the term "merged" in the former (and here applicable) regulation refers to the surviving entity (California) and that the "merging" corporation refers to the extinguished (Delaware) corporation. In the revised and now current form of regulations, the examples of transfers not subject to tax are found in Section 113.34 of Regulations 71. Both (d) and (e) in their earlier form are dropped from the revision. An example of a sale or transfer not subject to tax, as it has to do with a merger, now appears as subdivision (i) of Section 113.34. It reads as follows:

> "In a merger of corporations the surrender of stock of both the merging and continuing corporations in exchange for stock of the continuing corporation."

Without considering any change in substantial effect that may have been worked by this revision (which is not applicable in the instant case[4]), the verbiage is significant as indicating the meaning of the words "merging" and "merged" in the former subdivision (e). The

---

[4] *Helvering v. Reynolds Tobacco Co.*, 306 U.S. 110, 115.

new subdivision (i) retains the word "merging". It uses the word in contradistinction, not to "merged", but to "continuing". Presumably, the word "merging", which appears in both the old (e) and the new (i), has the same meaning in both. In each of the regulations it describes one of the two corporations which are parties to a merger. The other party, then, is clearly the "merged" corporation designated in (e), or the "continuing" corporation designated in (i). Under the new provision there can be no question as to which corporation is meant by each phrase. The "continuing" corporation is clearly the one which survives. The other, the "merging" corporation, must therefore be the expiring one. Where the same word ("merging") appears in both the old and the amended regulations, it cannot fairly be thought that it was used in contradictory senses in the two regulations. By opposing to it in the new regulation the word "continuing", any possible doubt as to the meaning of "merging" is removed. It becomes clear that "merged", in the old subdivision (e), was used to designate the "continuing" or surviving corporation.

CONCLUSION.

It is submitted that the transfer should be held to be exempt from tax under each of the regulations relied upon by petitioner; that the writ of certiorari should be granted, the judgment of the Circuit Court of Appeals reversed, and that court directed to enter judgment reversing the judgment of the District Court and directing

said District Court to enter judgment in favor of your petitioner, as prayed in the complaint.

Dated, San Francisco, California,
April 19, 1944.

Respectfully submitted,
M. C. SLOSS,
E. D. TURNER, JR.,
Attorneys for Petitioner.

SLOSS & TURNER,
Of Counsel.

(Appendix Follows.)

Appendix

STATUTES OF CALIFORNIA PROVIDING FOR MERGER OF CORPORATIONS.

Civil Code of California, Sec. 361:

"MERGER AND CONSOLIDATION OF CORPORATIONS. Any two or more corporations may be (a) merged into one of such constituent corporations, which is herein designated as 'the surviving corporation,' or (b) consolidated into a new corporation, which is herein designated as 'the consolidated corporation,' as follows:

(1) The board of directors of each corporation by resolution shall approve an agreement which shall set forth the terms and conditions of merger or consolidation, and the mode of carrying the same into effect, as well as the manner and basis of converting the shares of the constituent corporations into the shares of the consolidated or surviving corporation. The agreement also may provide for the distribution of cash, property, or securities, in whole or in part, in lieu of shares, to shareholders of the constituent corporations or any class of them; * * *."

(2) (Agreement to be signed by designated officers and acknowledged.)

"(3) The agreement must be approved by the vote of the holders of not less than two-thirds of the issued and outstanding shares of each class * * * of each of the constituent corporations * * *."

(*Certificate, contents.* President or vice-president and secretary or assistant secretary of each corporation to execute a certificate, verified, setting forth time and place

of the meeting of the board of directors and of the shareholders, a copy of the resolution there adopted, the vote in favor of such resolution and similar matters.)

"(5) *Filing of agreement.* The agreement so approved, executed and acknowledged and the certificates of its approval shall be filed with the secretary of state, and shall thereupon become effective, and the several parties thereto shall be one corporation * * *."

"(7) Upon the merger or consolidation, as provided herein, the separate existence of the constituent corporations shall cease, except that of the surviving corporation in case of merger, and the consolidated or surviving corporation shall succeed, without other transfer, to all the rights and property of each of the constituent corporations, and shall be subject to all the debts, and liabilities of each * * *."

Civil Code of California, Sec. 361a:

"CONSOLIDATION OR MERGER OF DOMESTIC AND FOREIGN CORPORATIONS. The merger or consolidation of any number of domestic corporations with any number of foreign corporations may be effected if such foreign corporations be authorized by the laws of the State or government under which they are formed to effect such a merger or consolidation * * *.

"The agreement of consolidation or merger, in addition to any filing required by the laws of the States of incorporation of any of the constituent corporations other than this State, shall be filed as required by the laws of the State of incorporation or proposed incorporation of the surviving or consolidated corporation and if such

State is a State other than this State a copy of the agreement, certified by the Secretary of State, or corresponding officer of the State of original filing, shall be filed in the office of the Secretary of State of this State * * *. With respect to any constituent domestic corporation or corporations the provisions of section 361, Civil Code, shall apply to the merger or consolidation and the effect thereof in so far as such provisions are not inconsistent with this section."

STATUTES OF DELAWARE PROVIDING FOR MERGER OF CORPORATIONS.

Corporation Law of Delaware, Sec. 59.

(Revised Code of Del. (1935), Sec. 2091):

"Any two or more corporations * * * existing under the laws of this State * * * may consolidate or merge into a single corporation * * * by means of such consolidation or merger as shall be specified in the agreement hereinafter required; the directors, or a majority of them, of such corporation * * * may enter into an agreement * * * prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect, * * * as well as the manner of converting the shares of each of the constituent corporations into shares or other securities of the corporation resulting from or surviving such consolidation or merger * * *."

"Said agreement shall be submitted to the stockholders of each constituent corporation * * * and the agreement so certified and acknowledged shall be filed in the

office of the Secretary of State, and shall thence be taken and deemed to be the agreement and act of consolidation or merger of the said corporations * * *.

Any one or more corporations * * * existing under the laws of this State, may consolidate or merge with one or more other corporations organized under the laws of any other state * * *, if the laws under which said other corporation or corporations are formed shall permit such consolidation or merger." (Here follow provisions, similar to those quoted above, for the making, authorization, filing in both states, and effect of such agreement.)

Sec. 60. (Revised Code of Del. (1935), Sec. 2092.) (This section provides that, upon the signing, acknowledgment, filing and recording of the agreement, the separate existence of the constituent corporations, except the one into which another or others have been merged, shall cease, and all rights, franchises and property of each of the corporations shall be vested in the surviving one.)

U. S. INTERNAL REVENUE CODE.

Sec. 1800. IMPOSITION OF TAX.

"There shall be levied, collected, and paid for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instrument, matters, or things, or any of them, are written or printed, the several taxes specified in such sections.

Sec. 1802. CAPITAL STOCK (AND SIMILAR INTERESTS).

* * * * * * *

(b) *Sales and Transfers*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such shares, certificate, interest, or rights, or not) * * * *."

TREASURY REGULATIONS 71.

Art. 35. SALES OR TRANSFERS NOT SUBJECT TO TAX.—The following are examples of transactions not subject to the tax:

* * * * * * *

(d) The surrender of the stock of the consolidating corporation in exchange for stock in the consolidated corporation, in the case of consolidation of two or more corporations.

(e) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger, and the substitution of new certificates for the certificates representing the old stock of the merging corporation.

(f) The surrender of stock for extinguishment or in exchange for new certificates to be issued without change of legal title.

(g) The transfer of stock from the decedent to the administrator or executor of the estate.

(h) The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law.

* * * * * * *

(r) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

INDEX

CITATIONS

587202—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 934

THE EMPORIUM CAPWELL COMPANY, A CORPORATION, PETITIONER

v.

CLIFFORD C. ANGLIM, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 77–84) is reported at 48 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 103–111) is reported at 140 F. 2d 224.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 24, 1944 (R. 112). A petition for rehearing was denied on March 1, 1944 (R. 113). The petition for a writ of certiorari

was filed April 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a Delaware corporation, owning all the common stock of taxpayer, entered into a merger agreement with taxpayer, whereby taxpayer became the continuing corporation and where the Delaware corporation surrendered its certificate of stock to a transfer agent of taxpayer, and taxpayer thereupon issued to Delaware's stockholders its stock in the same number of shares each stockholder held in Delaware, did taxpayer incur liability for documentary stamp taxes within the meaning of Section 1802 (b) of the Internal Revenue Code on the transfer of the stock from Delaware to its stockholders?

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 11–15.

STATEMENT

On September 20, 1939, taxpayer, a California corporation, and the Emporium Capwell Corporation, a Delaware corporation, entered into an agreement of merger as prescribed and provided by the laws of California and Delaware, respectively (R. 3, 69). The agreement provided that the two companies should merge into a single corporation. Taxpayer, the surviving corpora-

tion, would continue to exist under the merger and be governed by the laws of California. The terms and provisions of its amended articles of incorporation, then in force, including the number of shares of stock which the corporation was authorized to issue, would remain unchanged by the merger. (R. 11–12.) The agreement states (R. 12–15):

> (4) The terms and conditions of such merger shall be as follows:
>
> (a) The issued capital stock of The Emporium Capwell Corporation presently consists of 420,000 shares without par value, of which 7,147 shares are owned by The Emporium Capwell Corporation itself and held in its treasury, and the remaining 412,853 shares are outstanding in the hands of holders other than The Emporium Capwell Corporation. Such merger shall operate to extinguish all the issued capital stock of The Emporium Capwell Corporation. The 412,853 shares of such stock held by holders other than The Emporium Capwell Corporation shall, by such merger, be extinguished, and such merger shall effect the transfer, from The Emporium Capwell Corporation to the holders of the said 412,853 shares of its capital stock proportionately, of all the issued and outstanding common stock of The Emporium Capwell Company, being 412,853 shares without par value, all presently held by The Emporium Capwell Corporation. Accordingly, the

holders of shares of the capital stock of The Emporium Capwell Corporation (other than The Emporium Capwell Corporation itself) shall receive one share of the common stock of The Emporium Capwell Company in exchange for each share of such capital stock of The Emporium Capwell Corporation extinguished as aforesaid. The 7,147 shares of the capital stock of The Emporium Capwell Corporation held by The Emporium Capwell Corporation in its treasury shall, by such merger, be extinguished without the issuance or transfer to the holder thereof of any other shares of stock in exchange therefor;

* * * * *

(5) The mode of carrying the terms and provisions of the merger into effect, and the manner and basis of converting the shares, and rights to purchase shares, of The Emporium Capwell Corporation into shares, and rights to purchase shares, of The Emporium Capwell Company, shall be as follows:

(a) After the merger herein provided for shall have become effective, the outstanding shares of the capital stock of The Emporium Capwell Corporation will, by the terms of such merger hereinabove set forth, have been extinguished, and each of the holders of record of such shares (other than The Emporium Capwell Corporation itself) will, by the terms of such merger, have become the owner of a like

number of shares of the common stock of The Emporium Capwell Company, transferred to such holder from The Emporium Capwell Corporation. The Emporium Capwell Company, surviving corporation, will cause the certificate or certificates representing the 7,147 shares of the capital stock of The Emporium Capwell Corporation formerly held in the treasury of the latter to be cancelled, and will direct all other holders of record of the capital stock of The Emporium Capwell Corporation (except such holders as shall have and shall exercise the right to demand payment for such shares under the laws of the State of Delaware) to surrender their certificates of such capital stock to the surviving corporation or to The Bank of California, National Association, Transfer Agent for the common stock of The Emporium Capwell Company, in order to receive certificates evidencing the ownership of a like number of the shares of the common stock of The Emporium Capwell Company; and upon such surrender of any such certificate of such capital stock, The Emporium Capwell Company will execute and its said Transfer Agent will cause to be delivered to the record holder thereof in exchange therefor, a certificate evidencing the ownership of a like number of shares of the common stock of The Emporium Capwell Company, all as a part of the merger herein provided for;

* * * * *

The Delaware corporation owned all of the taxpayer's common stock, the value of which was $8,511,808.03. The only other asset of Delaware was cash in the amount of $6,769.88. It owed accounts and taxes in the amount of $9,395.41. (R. 86.) Delaware owned 7,147 shares of its own stock and its remaining 412,853 shares were held by the general public. The common stock of taxpayer was evidenced by one stock certificate for 412,853 shares. (R. 86.)

The agreement for merger and the accompanying documents were filed in the office of the Secretary of State of Delaware on January 31, 1940 (R. 87). Upon consummation of the merger agreement Delaware endorsed the stock certificate in blank and delivered it to the transfer agent of the taxpayer (R. 86). The certificate was then canceled by the agent and new certificates for shares of common stock of taxpayer were issued and distributed to Delaware's stockholders in proportion to the number of shares which each such stockholder owned in Delaware. The Delaware stockholders surrendered their old certificates when the new certificates for taxpayer's stock were received. (R. 86–87.) A letter was written by Delaware to taxpayer's transfer agent stating that the stock certificate was surrendered in order that the transfer of the stock from Delaware to its stockholders might be made on taxpayer's books (R. 75–76).

On June 10, 1941, the Commissioner of Internal Revenue assessed documentary stamp taxes against taxpayer for $16,514.12 upon the transfer of taxpayer's shares from Delaware to Delaware's stockholders (R. 72, 87). Taxpayer paid these taxes on June 14, 1941 (R. 87), and filed claim for refund on July 2, 1941 (R. 73). On November 12, 1941, the Commissioner rejected the claim for refund (R. 73). Recovery was denied by the District Court (R. 89), and the Circuit Court affirmed (R. 111).

ARGUMENT

The court below correctly held that the transfer of the stock owned by the merged corporation to its own stockholders was subject to the stamp tax imposed by Section 1800 of the Internal Revenue Code (Appendix, *infra*, p. 11). The broad scope of this statute was recognized by this Court in *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, 62–63, and in *Founders General Co.* v. *Hoey,* 300 U. S. 268, 275. It is settled that every transfer of stock is within the reach of the tax, unless specifically excluded.

The recent case of *United States* v. *Seattle-First Nat. Bank,* No. 267, present Term, decided March 27, 1944, not yet reported, dealt with an exclusion which was authorized by Treasury regulations, but which is not applicable here.

This Court's opinion was grounded upon the proposition that the federal act under which the

consolidation was effected provided that, upon performance of the statutory requisites for a consolidation, the assets of the constituent corporations were deemed vested automatically in the consolidated corporation by virtue of the consolidation and without any deed or other instrument of transfer. This Court there said:

> We must look only to the immediate mechanism by which the transfer is made effective. If that mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties, then the transfer may truly be said to be "wholly by operation of law."
>
> * * * * *
>
> Thus it is the National Banking Act that is the mechanism by which the transfer of securities is made effective. No voluntary act by the parties is necessary. It follows that the transfer occurred "wholly by operation of law."

Here there is no statute which provides that the transfer to the stockholders shall occur by operation of law and it seems clear that the case is not within the scope of the regulation as interpreted by this Court. The *Seattle-First Nat. Bank* case involved a transfer of assets of a state bank to the consolidated company, which became entitled to the assets under the statute without the necessity of a transfer. The comparable transaction here was the transfer of the assets

of Delaware to the taxpayer. But that is not the taxable transaction. The tax was imposed upon a transfer to the stockholders of Delaware. As there was no statutory provision for vesting title to the stock in them individually, the taxable transfer was occasioned by the voluntary acts of the parties. The court below similarly distinguished its own earlier decision in the *Seattle-First Nat. Bank* case (R. 111).

Taxpayer further asserts that the transfer is excluded from the tax under the provisions of Treasury Regulations 71, Article 35 (e) (Appendix, *infra,* p. 14), which reads as follows:

> The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger, and the substitution of new certificates for the certificates representing the old stock of the merging corporation.

Taxpayer contends that the court below erred in treating it as the "merging" corporation rather than the "merged" corporation. The point is of no consequence since in either event no *stock of Delaware* was involved in the taxable transfer. Applying the regulation in the manner contended for by taxpayer, it refers to a transfer of the stock of taxpayer in exchange for the *stock of Delaware.* What Delaware transferred was the stock of taxpayer which it owned. Taxpayer thus contends that the stock in Delaware's port-

folio is *stock of Delaware.* This is obviously not the meaning of the regulation since investment stock is elsewhere referred to in the regulations as "stock owned by a corporation." See Article 34 (r), Appendix, *infra,* pp. 13–14. In any event, no conflict is asserted with respect to this point.

CONCLUSION

There is no conflict of authorities. The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

MAY 1944.

APPENDIX

Internal Revenue Code:

SEC. 1800. IMPOSITION OF TAX.

There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections. (26 U. S. C., Sec. 1800.)

SEC. 1802. CAPITAL STOCK (AND SIMILAR INTERESTS).

* * * * *

(b) *Sales and Transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not) * * *. (26 U. S. C., Sec. 1802.)

Treasury Regulations 71 (1932 ed.):

ART. 31. *Basis of tax.*—Sales or transfers of stock, either before or after issuance of a certificate, or of rights to subscribe for or to receive such stock, are taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to, stock, or to the right to subscribe for or to receive such stock, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

As used in this chapter the term "sale" or "transfer" includes any of the transactions or dealings in stock, or in rights to subscribe for or to receive stock, which are subject to the tax imposed under Schedule A–3, except where from the context it is clear that a different meaning is intended. As to the use of the term "stock" see article 25.

ART. 34. *Sales or transfers subject to tax.*—The following are examples of transactions subject to the tax:

(*a*) The sale or transfer of shares of stock, whether or not represented by certificates.

(*b*) The transfer of stock to or by trustees.

(*c*) The transfer of voting trust certificates.

(*d*) The sale or transfer of temporary or interim certificates.

(*e*) The sale or transfer of certificates or shares representing beneficial interests in an association. See article 125 (1) (*d*).

(*f*) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(*g*) The transfer of the right to subscribe for stock, whether or not evidenced by warrants.

(*h*) The transfer of the right to receive a stock dividend already declared.

(*i*) The transfer or surrender of stock to a corporation, for the purpose of the corporation, whether or not it intends eventually to sell such stock.

(*j*) The sale or transfer of stock, made by a broker, directly or indirectly, for himself.

(*k*) The sale or transfer of stock by a broker at a price different from that at which he accounts to his selling customer.

(*l*) The transfer of stock in pursuance of a gift, bequest, or conveyance by trustees.

(*m*) The transfer of stock from parties occupying fiduciary relations to those for whom they hold stock.

(*n*) The transfer of stock by an administrator or executor to the legatee or distributee.

(*o*) The transfer of stock on the books of a domestic corporation, regardless of where the sale is made or the stock certificates delivered.

(*p*) The sale or transfer within the territorial jurisdiction of the United States, of stock of a foreign corporation.

(*q*) The transfer of stock of a corporation to be merged to the merging corporation prior to the actual merging and as a condition precedent to the merger.

(*r*) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation, such a transfer being effected by

the act of the parties and not wholly by operation of law.

(*s*) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(*t*) The transfer of legal title to stock irrespective of whether or not the transferee receives any beneficial interest therein, except as provided in article 35 (*k*).

(*u*) Transfer of stock from old firm to new firm succeeding to its business where personnel is different.

(*v*) Transfer of stock from a firm to individual members thereof upon dissolution of the business.

(*w*) Loans of shares or certificates of stock, including intra-office borrowings.

ART. 35. *Sales or transfers not subject to tax.*—The following are examples of transactions not subject to the tax:

* * * * *

(*e*) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger, and the substitution of new certificates for the certificates representing the old stock of the merging corporation.

(*f*) The surrender of stock for extinguishment or in exchange for new certificates to be issued without change of legal title.

* * * * *

(*h*) The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original

trust agreement, which is a transfer resulting wholly by operation of law.

* * * * *

(*r*) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

* * * * *

ART. 136. *Parties to taxable instrument liable.*—Any party to a taxable transaction is responsible to the Government for affixing and canceling stamps in the required amount. The law does not prohibit parties in interest from entering into an agreement as to which of them shall actually pay same.

U. S. GOVERNMENT PRINTING OFFICE: 1944